FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

No. 772

FRED STEIN AND BERNARD STEIN, *Petitioners,*

v.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

MORRIS LAVINE

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

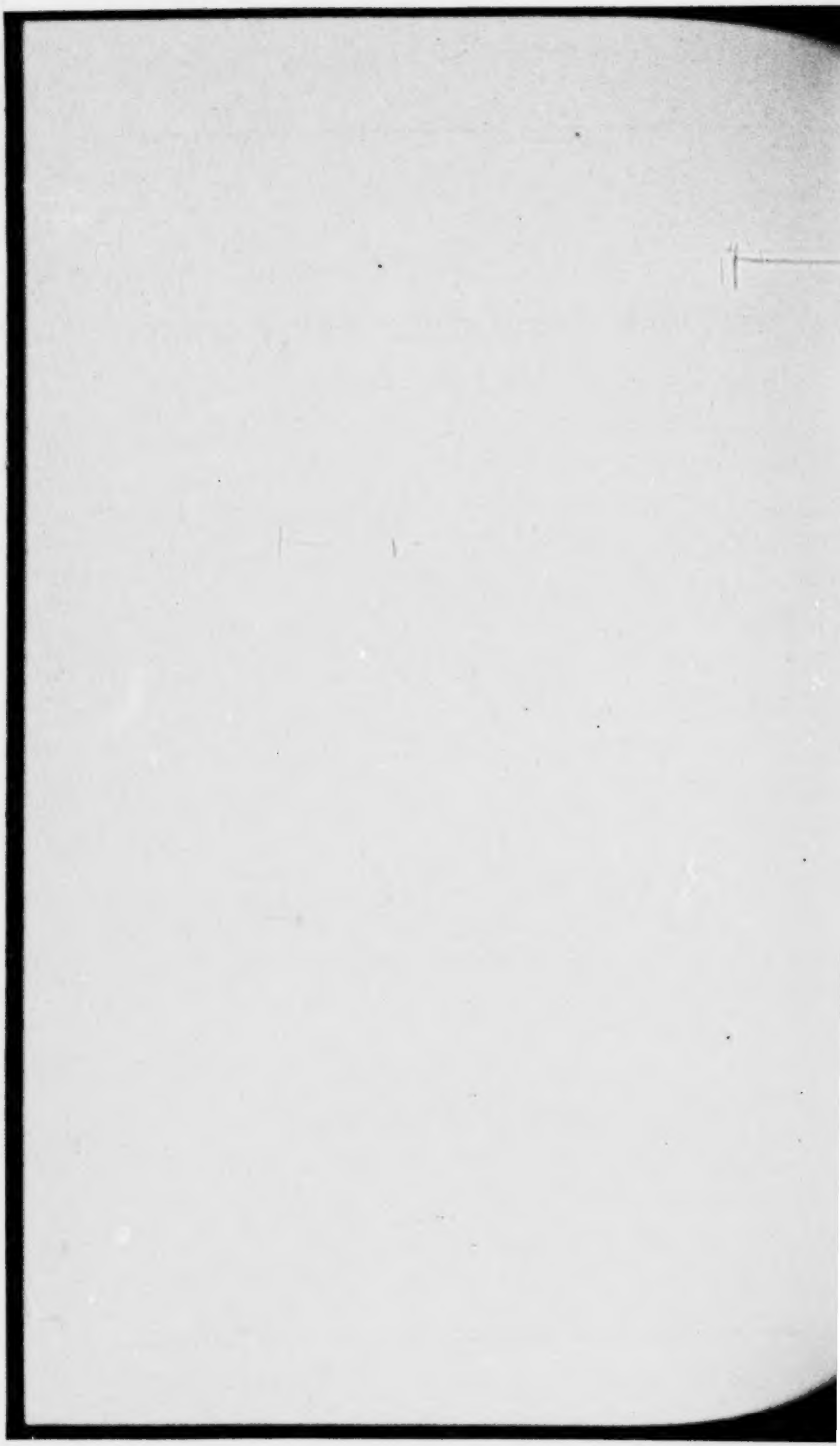

TABLE OF CONTENTS.

PETITION.

BRIEF.

Page

XII.

XIII.

XIV.

XV.

Page

XXI.

XXII.

XXIII.

XXIV.

TABLE OF AUTHORITIES CITED.

Cases.

CONSTITUTION AND CODES.

MISCELLANEOUS.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

No. .....

FRED STEIN AND BERNARD STEIN, *Petitioners,*

v.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

To the Honorable Fred M. Vinson, Chief Justice, and to the Honorable Associate Justices of the Supreme Court of the United States:

Your petitioners, Fred Stein and Bernard Stein, respectfully petition this Honorable Court for a writ of certiorari, directed to the United States Circuit Court of Appeals for the Ninth Circuit, to review the judgment of that court, affirming the convictions and sentences to the penitentiary of the petitioners above named for violation of Title 21, section 174, USC, and as grounds petitioners respectfully represent as follows:

OPINION BELOW.

The opinion of the court below has not been published, but is contained at pages 401-410 of the record on appeal from the Ninth Circuit Court of Appeals.

JURISDICTION.

Jurisdiction of this Court is invoked under Title 28, sec. 347, USCA.

The judgment of the Circuit Court of Appeals was rendered on February 27, 1948. Petition for rehearing within the time prescribed by law was filed with the Court and denied on March 30, 1948. (R. 412) Petition for certiorari is filed in this Court within 30 days of said denial thereof from the judgment of the Circuit Court of Appeals affirming the judgments of the District Court of the United States in convictions for violation of Title 21, section 174, USCA.

STATUTES INVOLVED.

Title 21, U. S. C. A., Section 173. (The Jones-Miller Act)

"Sec. 173. Importation of narcotic drugs prohibited; exceptions, crude opium for manufacture of heroin; forfeitures. It is unlawful to import or bring any narcotic drug into the United States or any territory under its control or jurisdiction; except that such amounts of crude opium and coca leaves as the board finds to be necessary to provide for medical and legitimate uses only, may be imported and brought into the United States or such territory under such regulations as the board shall prescribe, but no crude opium may be imported or brought in for the purpose of manufacturing heroin. All narcotic drugs imported under such regulations shall be subject to the duties which are now or may hereafter be imposed upon such drugs when imported.

"Any narcotic drug imported or brought into the United States or any territory under its control or jurisdiction, contrary to law, shall (1) if smoking opium or opium prepared for smoking, be seized and summarily forfeited to the United States Government with-

out the necessity of instituting forfeiture proceedings of any character; or (2), if any other narcotic drug, be seized and forfeited to the United States Government, without regard to its value, in the manner provided by sections 514 and 515 of Title 19, or the provisions of law hereafter enacted which are amendatory of, or in substitution for, such sections. Any narcotic drug which is forfeited in a proceeding for condemnation or not claimed under such sections, or which is summarily forfeited as provided in this subdivision, shall be placed in the custody of the board and in its discretion be destroyed or delivered to some agency of the United States Government for use for medical or scientific purposes. (Feb. 9, 1909, c. 100; sec. 2, 35 Stat. 614; Jan. 17, 1914, c. 9, 38 Stat. 275; May 26, 1922, c. 202; sec. 1, 42 Stat. 596; June 7, 1924, c. 352, 43 Stat. 657.)"

Title 21, U. S. C. A., Section 174.

"Sec. 174. Same; penalty; evidence. If any person fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or assists in so doing or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported contrary to law, such person shall upon conviction be fined not more than $5,000 and imprisoned for not more than ten years. Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury. (June 9, 1909, c. 100; Sec. 2, 35 Stat. 614; Jan. 17, 1914, c. 9, 38 Stat. 275; May 26, 1922, c. 202; Sec. 1, 42 Stat. 596; June 7, 1924, c. 352, 43 Stat. 657.)"

Federal Communications Act, Title 47, section 605:

"* * * and no person not being authorized by the sender shall intercept any communication and divulge

or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; and *no person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire or radio and use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto;* and no person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of the same or any part thereof, *or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto; . . .*" (Emphasis added.)

QUESTIONS PRESENTED BY THIS PETITION.

1. Whether the instrumentalities of the telephone may lawfully be used by federal narcotic officers in collaboration with a woman seeking revenge on a man who jilted her to bring about the arrest and conviction of a person or person of a violation of the Federal Narcotic Act.

2. Whether the acts of a woman seeking revenge on a man with whom she had been living, and in herself secreting narcotics in and about the premises in three separate packages which she claimed were his, but which he never handled or opened or saw were such acts as constitute entrapment ("dirty business") on the part of the Government, where she collaborated with Government officers in luring one of the appellants to the grounds of the house where she had herself secreted and planted the narcotics and thereafter brought about his arrest and conviction.

3. Whether the finding on the premises of what was thought to be narcotics requires the officers summarily to seize and destroy the same, or whether their failure so to do and their permitting the woman to use them for the purpose of luring appellant Stein and bringing about

the arrest of other persons constitutes entrapment ("dirty business") as a matter of law and is forbidden by sound public policy. Whether the government is estopped from persecution by the "dirty business."

4. Whether a former mistress of a man who holds nominal part title in her name as joint tenant to a house which he bought, and is thereafter ousted from the house, may lawfully bring narcotic agents on to the premises, without a search warrant, to both search and seize narcotics when such search and seizure is not an incident or part of a lawful arrest and is not made with any search warrant, or other process and whether such procedure violates the defendant's rights under the Fourth and Fifth Amendments to the Constitution of the United States.

5. Whether the arrest of appellants were without reasonable or probable cause and whether it could be made without a warrant.

6. Whether the court should have directed the verdicts for insufficiency of the evidence and for unlawful seizure in violation of the Fourth and Fifth Amendments.

7. Whether the statutory presumption as to guilt from possession of narcotics is inapplicable in a case such as this, where the person or persons who are accused were not present and where the alleged narcotics were removed from an open barn or garage and which narcotics were never shown to have been owned or actually possessed by appellants or the contents ever used by appellants.

8. Whether the finding of a bottle of *yen shee*, a different substance than that charged in the indictment (and never shown to be in the actual possession of any defendant) and its seizure in the house a day after the arrest of appellants, without any search warrant or other legal process, and without the consent of appellants, was unlawful and in violation of the Fourth and Fifth Amendments to the Constitution of the United States.

9. Whether the Court erred in arbitrarily refusing to exclude the evidence of the *yen shee* and in ruling that it was not unlawfully searched and seized in violation of the Fourth and Fifth Amendments to the Constitution of the United States.

10. Whether the admission of such evidence violated defendants' rights under the Fourth and Fifth Amendments to the Constitution of the United States.

11. Whether the trial court erred during the trial of the case in permitting a vast amount of evidence to be introduced regarding the personal relationship of one of the appellants, Fred Stein, and the mistress, Margo Brandler, who brought about his arrest.

12. Whether Title 21, Section 174, U. S. Code inherently and as construed and applied in this case, is unconstitutional and in violation of the due process clause of the Fifth Amendment to the Constitution of the United States, in providing an arbitrary presumption of guilt where the evidence did not show that Fred Stein had or ever had had possession of the narcotics involved in this case.

13. Whether Title 21, Section 174 is unconstitutional and in violation of the Fifth Amendment to the Constitution of the United States, inherently and as construed and applied in this case, in arbitrarily shifting the burden of proof to the defendants.

14. Whether the trial court erred in the instructions it gave on entrapment, and particularly the instruction that entrapment did not exist where a private party did the inducing, even though in collaboration with government officers.

15. Whether the Circuit Court of Appeals erred in holding there was no entrapment when brought about by a mistress in collaboration with federal narcotic officers.

16. Whether the trial court erred in its other instructions to the jury:

(a) As to the time of the occurrence of the offense being immaterial where different dates would make different offenses, and the *secreting* occurred on September 14, which was the date established by the government.

17. Whether the trial court erred in refusing a series of defense requested instructions:

(a) On entrapment.

(b) On the finding of narcotics at a location is not proof that the owner of the property is the possessor thereof.

(c) On the time of the offense.

(d) On entrapment by private individuals working with government agents.

(e) On proof of possession being personal to the accused.

(f) On the finding of narcotics in an open garage not being sufficient to connect the owner of the property with it.

(g) On the requirement that the possession of an accused must be immediate and exclusive.

(h) On Margo Brandler being an accomplice as a matter of law (which would mean that her testimony must be viewed with caution and distrust).

REASONS FOR GRANTING THE WRIT.

I.

The case involves new and important questions of criminal law and procedure not heretofore decided by this Honorable Court. The Circuit Court of Appeals has implicitly decided that the use of a telephonic instrument in collaboration with federal narcotic officers for the purpose of bringing about entrapment is not unlawful and not in vio-

lation either of the telephonic communications act or of sound public policy. It has also decided that since a private person initiates the "dirty business" of entrapment of an individual that that entrapment is not unlawful and not against public policy if a Federal officer joins in the entrapment.

II.

The decision of the Circuit Court of Appeals is in conflict with the applicable decisions of this Honorable Court on search and seizure and unlawful arrest in violation of the Fourth and Fifth Amendments to the Constitution of the United States.

III.

The procedural questions involved in this case are matters of great importance in the handling and interpretation of the Federal narcotic laws and the restrictions upon Federal officers in respect thereto, and in interpreting the scope and effect of the Telephonic Communications Act, Title 47, Section 605 U. S. Code.

IV.

This Court should exercise its supervisory powers in criminal matters and decree the law in respect to the use of telephonic instruments in furtherance of entrapments in respect to this type and kind of case.

CASES BELIEVED TO SUSTAIN JURISDICTION AND TO ENTITLE PETITIONERS TO THE WRIT.

The use of a telephone to entrap a person and bring about his arrest is forbidden for the benefit of anyone, including the Federal Government, and the telephone may not be used as an instrumentality to bring about the arrest and conviction of a person and to lure him to a place for the purpose of bringing about his arrest.

Nardone v. *U. S.*, 302 U. S. 379, 82 L. Ed. 314; 308 U. S., 338, 84 L. Ed. 307;
Weiss v. *U. S.*, 308 U. S. 321, 84 L. Ed. 298;

Entrapment is against sound public policy.

Sorrells v. *U. S.*, 287 U. S. 435.

The Fourth and Fifth Amendments to the Constitution of the United States forbid illegal search and illegal seizure. Each is forbidden.

Boyd v. *U. S.*, 116 U. S. 616;
Takahashi v. *U. S.*, 143 Fed. (2d) 118;
Di Re v. *U. S.*, 92 L. ed., Advance Opins. No. 6, p. 218.
Johnson v. *U. S.*, 92 L. ed. 323.

The Fourth and Fifth Amendments forbid illegal arrest.

Di Re v. *U. S.*, 92 L. Ed. 218.
Sorrells v. *U. S.*, 287 U. S. 435.

The Trial Court must give proper instructions to the jury.

Screws v. *U. S.*, 325 U. S. 91.

Respectfully submitted,

MORRIS LAVINE.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

No. .....

FRED STEIN AND BERNARD STEIN, *Petitioners,*

v.

UNITED STATES OF AMERICA, *Respondent.*

BRIEF IN SUPPORT OF PETITION.

OPINION BELOW.

The opinion of the court below has not been published, but is contained at pages 401-410 of the record on appeal from the Ninth Circuit Court of Appeals.

JURISDICTION.

Jurisdiction of this Court is invoked under Title 28, sec. 347, USCA.

STATUTES INVOLVED.

Title 21, U. S. C. A., Section 173 (The Jones-Miller Act):

"Sec. 173. Importation of narcotic drugs prohibited; exceptions, crude opium for manufacture of heroin; forfeitures. It is unlawful to import or bring any narcotic drug into the United States or any territory

under its control or jurisdiction; except that such amounts of crude opium and coca leaves as the board finds to be necessary to provide for medical and legitimate uses only, may be imported and brought into the United States or such territory under such regulations as the board shall prescribe, but no crude opium may be imported or brought in for the purpose of manufacturing heroin. All narcotic drugs imported under such regulations shall be subject to the duties which are now or may hereafter be imposed upon such drugs when imported.

"Any narcotic drug imported or brought into the United States or any territory under its control or jurisdiction, contrary to law, shall (1) if smoking opium or opium prepared for smoking, be seized and summarily forfeited to the United States Government without the necessity of instituting forfeiture proceedings of any character; or (2), if any other narcotic drug, be seized and forfeited to the United States Government, without regard to its value, in the manner provided by sections 514 and 515 of Title 19, or the provisions of law hereafter enacted which are amendatory of, or in substitution for, such sections. Any narcotic drug which is forfeited in a proceeding for condemnation or not claimed under such sections, or which is summarily forfeited as provided in this subdivision, shall be placed in the custody of the board and in its discretion be destroyed or delivered to some agency of the United States Government for use for medical or scientific purposes. (Feb. 9, 1909, c. 100; sec. 2, 35 Stat. 614; Jan. 17, 1914, c. 9, 38 Stat. 275; May 26, 1922, c. 202; sec. 1, 42 Stat. 596; June 7, 1924, c. 352, 43 Stat. 657.)"

Title 21, U. S. C. A., Section 174:

"Sec. 174. Same; penalty; evidence. If any person fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or assists in so doing or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported

contrary to law, such person shall upon conviction be fined not more than $5,000 and imprisoned for not more than ten years. Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury. (June 9, 1909, c. 100; Sec. 2, 35 Stat. 614; Jan. 17, 1941, c. 9, 38 Stat. 275; May 26, 1922, c. 202; Sec. 1, 42 Stat. 596; June 7, 1924, c. 352, 43 Stat. 657.)"

Federal Communications Act, Title 47, Section 605:

"* * * and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; and *no person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire or radio and use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto;* and no person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto; . . ." (Emphasis added).

SHORT STATEMENT OF FACTS.

Appellants were indicted for violation of the Jones-Miller Act, the charging part of which alleged that "on or about September 14, 1945, at Los Angeles" they did "knowingly, wilfully, unlawfully, feloniously and fraudulently *receive, conceal,* and *facilitate* the *transportation* and *concealment* after importation of a certain narcotic drug to-wit: approximately 56 ounces of prepared smoking

opium, which said smoking opium, as the defendants then and there well knew, had been imported into the United States of America contrary to law" (R. 2). The appellants were convicted and sentenced to prison.

The specific evidence involved eight small tobacco type cans, containing prepared smoking opium, all tightly sealed and wrapped with newspaper (R. 75) (R. 275) (R. 235) (R. 138) and containing a date on the newspaper of August 7, 1945 (R. 158). The cans had never been opened prior to their seizure. They bore no fingerprints of the accused and there was no evidence of fingerprints or otherwise to show that they had been in the hands of Fred Stein at any time, and not in the hands of Bernard Stein until the entrapment arrest hereafter described.

Fred Stein had left his house at 3930 Dixie Canyon Road, Van Nuys, California, on September 11, after a second quarrel with his mistress, Margaret Brander, who made demands upon him for money which she did not receive. On a date after Fred Stein had packed up and left the house or later she claims to have taken the unopened cans out of an open garage adjoining the house, herself segregating them into three packages and herself secreting them in three different places on the premises (R. 152). Then she called the federal narcotic officers, arranged with them to meet her, repeatedly telephoned to a friend of Bernard Stein to locate him. Bernard Stein is the brother of Fred Stein. After such repeated calls she finally talked to Bernard Stein on the telephone and urged him to come to the premises and meet her. John Fisher, Agent Koehn listened in on the receiver (R. 269). Thereafter she persuaded Bernard Stein to pick up flower pots and later one of the three paper bags in which she had placed the narcotics Fisher, a friend who came with Bernard Stein, picked up two of them. (Fisher is not an appellant.) When they came around to the front of the house, the narcotic officer Koehn, who had posed as Mr. Anderson, arrested Bernard Stein and John Fisher for "transportation" of the nar-

cotics. Fred Stein, who was never present, and never shown to have handled or possessed the same was later arrested and jointly tried and convicted for "secreting" the narcotics.

There was no charge in the indictment of possession of the narcotics (R. 2-3). The charge of concealment was that on September 14, 1945, the date Margo Brandler *concealed* them.

Throughout, the instrumentality of the telephone was used to lure Bernard Stein to the Dixie Canyon address where he was thereafter arrested while aiding Margo Brandler carry flower pots and the wrapped up package.

Until 8 o'clock that night, and two hours after the federal officers had been contacted and arrangements made to try to lure Bernard Stein to the address, Bernard Stein had no idea of committing any act which could be construed as criminal. Margaret Brander telephoned him while Officer Koehn was listening and she urged him to meet her, all for the purpose of springing a trap (R. 160 et seq.) (R. 268-269) (R. 253-256).

Margaret Brander said she was to get her clothes and had promised Barney to give him the "stuff" if he would meet her and bring her clothes back. Mrs. Brander continued to coax Barney to take the packages after which Mr. Fisher said "Where are those flower pots?" (R. 216), after which Officer Koehn said "Stick them up, boys," at which time the officers arrested Bernard Stein and John Fisher (R. 218).

Fred Stein was not present but was later apprehended on an indictment charging him jointly with possession of the narcotics.

The cans were tightly wrapped and never had been opened, according to Marguerite Brander, by any of the defendants (R. 77). The officers at the time of the arrest and at the time of the seizure of the narcotics did not know that the packages contained narcotics (R. 64). It required expert examination to tell the contents of the cans (R. 55,

64, 73, 99, 100, 109). The packages were not opened until the next day (R. 77).

Officer Davis testified "I did not smell any smoking opium up there that night" (R. 93).

The next day Marguerite Brander returned to the house with the officers and after a search removed a bottle containing oil of wintergreen and which it is claimed also contained yen shee, a narcotic, also a derivitive of smoking opium (R. 196). It was never shown to have been in the possession of any defendant. This evidence was introduced over the objection that it was unlawfully searched and seized in violation of the Fourth and Fifth Amendments to the Constitution of the United States (R. 196). Motions were made to strike it as not within the issues of the indictment as irrelevant, incompetent and immaterial.

Motions were made to exclude the evidence, which were denied on the merits and exception noted (R. 193-196) (R. 370-371).

At the close of the Government's case and at the close of the defendants' case motions were made for directed verdict and were denied and exception noted. Motions were also made to direct a verdict on the grounds of entrapment solely, which motions were denied and exception noted (R. 286-291) (R. 371).

Thereafter several instructions were requested of the Court on the subject of entrapment, and other instructions were given by the Court, which in effect held that where a private person arranged the arrest there could be no enrapment. These instructions were conflicting (R. 36 et seq.).

The Circuit Court of Appeals held in its decision that where the "inducement" and arrest are arranged by a private person (R. 406) it would not be entrapment even though aided and abetted by officers of the Federal Government.

It also implicitly held by the Circuit Court that the use of the telephone in arranging an arrest was not unlawful, although the opinion fails to discuss this.

It further held that where a motion was made to strike the evidence regarding the yen shee, which was introduced for the first time and which became known for the first time in the trial of the case, such objections were too late (R. 407), contrary to the holding of *McNabb* v. *U. S.*, 318 U. S. 332, 87 L. Ed. 819.

The Circuit Court of Appeals also overruled all of the argument for failure of the trial court to give several requested instructions.

It also held that where property is held in joint tenancy under California law by the mistress of a man, that she may notify Federal officers *without any search warrant to enter onto the premises* and *seize* property not her own but which it is claimed belonged to the man with whom she was living, because assertedly found on the premises and that such seizure, if his, is not in violation of the Fourth and Fifth Amendments to the Constitution of the United States.

SUMMARY OF THE ARGUMENT.

1. The Circuit Court of Appeals erred in holding that the instrumentality of the telephone might be used by federal narcotic officers and a woman seeking revenge, to lure a man and induce him to come to a place for the purpose of bringing about his arrest.

2. The Circuit Court erred in holding that the acts of a woman, seeking revenge, in herself secreting narcotics in three separate packages in and about the premises, which narcotics she claimed were his, but which the evidence fails to show that he ever handled or opened, were such acts as constitute entrapment on the part of the government where she collaborated with government officers in luring one of the appellants to the grounds of the house to where she had herself secreted and planted the narcotics in three separate places, and thereafter took accused to those places to pick up the wrapped packages which had no smell or odor to them and thus brought about his arrest.

3. The Circuit Court erred in holding that when federal narcotic officers were told that there were narcotics and where they were secreted that it was not their statutory duty summarily to seize the packages and in holding that the use of these packages thereafter to lure accused to pick them up did not constitute entrapment as a matter of law.

4. The Circuit Court erred in holding that because a mistress of a man holds nominal title to property in her name as a joint tenant that she may bring narcotic agents on the premises and that without any search warrant they may both search and seize narcotics without any knowledge that they are narcotics or without reasonable and probable cause and also seize appellant and arrest him without a warrant and in holding that such procedure is not violative of the Fourth and Fifth Amendments to the Constitution of the United States.

5. The Circuit Court erred in upholding the District Court ruling in failing to direct the verdict for insufficiency of the evidence and for violation of the Fourth and Fifth Amendments to the Constitution of the United States.

6. The Circuit Court of Appeals should have directed the verdict because of the use of evidence introduced in the case which had been obtained by unlawful search and seizure in violation of the Fourth and Fifth Amendments to the Constitution of the United States.

7. The statutory presumption as to guilt from possession of narcotics is inapplicable in a case such as this where the person or persons who are accused were not present when the narcotics were secreted, and where the alleged narcotics were removed from an open barn or garage, equally open to appellants and the mistress and anybody else and where the narcotics were never shown to have been actually owned or actually possessed by the appellants or either of them prior to the seizure, or that the contents of the particular narcotics seized were ever used by the appellants.

8. The courts below erred in holding that the rights of each of the appellants were not violated under the Fourth and Fifth Amendments to the Constitution of the United States where a bottle labeled "oil of wintergreen" and allegedly containing yen shee, a different substance and narcotic than that charged in the indictment (and never shown to be in the actual possession of any defendant), and which was allegedly seized without any search warrant or other legal process a day after the arrest of the appellants, and without their knowledge or consent, and without any showing that they had ever owned or used the product, was introduced in evidence in the trial.

9. The District Court erred in arbitrarily refusing to exclude the evidence of the claimed possession of the yen shee and in ruling that it was not unlawfully searched and seized in violation of the Fourth and Fifth Amendments to the Constitution of the United States.

10. The courts below erred in holding that the admission of such evidence did not violate the defendants' rights under the Fourth and Fifth Amendments to the Constitution of the United States.

11. The Trial Court erred during the trial of the case in permitting a vast amount of evidence to be introduced regarding the personal relationship of one of the appellants, Fred Stein, and the mistress, Margo Brandler, who brought about his arrest.

12. Title 21, Sec. 174, U. S. Code, inherently and as construed and applied in this case, is unconstitutional and in violation of the due process clause of the Fifth Amendment to the Constitution of the United States in providing an arbitrary presumption of guilt where the evidence does not show that Fred Stein had or was ever in possession of the narcotics involved in this case. Title 21, Sec. 174, U. S. Code, is unconstitutional and in violation of the Fifth Amendment to the Constitution inherently and as con-

strued and applied in this case in arbitrarily shifting the burden of proof to the defendants.

13. The trial court erred in the instructions it gave to the jury on entrapment ("dirty business"), and particularly the instruction that entrapment ("dirty business") did not exist where a private party did the inducing and entrapping even though in collaboration with government officers.

14. The Circuit Court of Appeals erred in holding there was no entrapment when brought about by a mistress in collaboration with federal narcotic officers because it was done, in the opinion of the Circuit Court, by a "private party" as the main or moving force in the entrapment.

15. The Trial Court erred in its other instructions to the jury with relation to the time of the occurrence of the offenses being immaterial where different dates would make different offenses, and the secreting charged in the indictment was done by the Government's own witness on September 14 which was the first date established by the Government of the secretion of the narcotics in question.

16. The Trial Court erred in refusing to give a series of defense requested instructions:

a. On entrapment.

b. On the finding of narcotics at a location is not proof that the owner of the property is the possessor thereof.

c. On the time of the offense.

d. On entrapment by private individuals working with government agents.

e. On proof of possession being personal to the accused.

f. On the finding of narcotics in an open garage not being sufficient to connect the owner of the property with it.

g. On the requirement that the possession of an accused must be immediate and exclusive.

h. On Margo Brandler being an accomplice as a matter of law (which would mean that her testimony must be viewed with caution and distrust).

17. The evidence taken at the trial of the case affirmatively shows that the conduct of the government officers and their agents amounted to consent on the part of the government acting through said officers and agents to the receiving and transporting by the defendants of smoking opium, which said smoking opium prior to such receiving and transporting by said defendants had been secreted by a person acting as an agent for the said United States Government, and that the said possession of the agent was the possession of the government and required summary forfeiture to the government.

18. That the government is estopped from this prosecution by reason of the entrapment ("dirty business"), and the lower court erred in not quashing the indictment and ordering the case dismissed.

I.

The Circuit Court erred in holding that the instrumentality of the telephone might be used by federal narcotic officers and a woman seeking revenge, to lure a man and induce him to come to a place for the purpose of bringing about his arrest.

This court should grant certiorari to decide this important question, not heretofore determined by this court and to construe the law of entrapment and the law relating to the use and misuse of the telephone. Congress has forbidden such misuse in Section 605 of Title 47 U. S. Codes, in addition to the law of entrapment being against sound public policy.

The evidence is, unmistakably, that up to the time that Marguerite Brander phoned Bernard Stein in the presence and hearing of Federal Officer Koehn, he had no possession of any narcotics and no intention of possession of the same.

The solicitation, inducement, and persuasion to come to the house at 3930 Dixie Canyon Avenue, came from Marguerite Brander, in cooperation with Federal Agent Koehn. It was she who telephoned to Bernard Stein, while Officer Koehn was listening. She had been living with an elderly, former federal officer named Mr. Keys (R. 197) and Mr. Keys had talked to Federal officers about Fred Stein prior to this night (R. 201). It was Mr. Keys who gave Marguerite Brander the name of Mr. Koehn and she telephoned him and he came over and saw her at 7:00 o'clock that night (R. 202).

She thereafter called Johnny Fisher on the telephone, Mr. Koehn being present. He heard the conversation. She let him listen in on the conversation and she called in Mr. Koehn's presence and asked them to come over to the house (R. 205).

Furthermore the lure was constantly conducted through the means of a telephone. The conversations were conducted by phone and the inducement was conducted by telephone by Miss Brander in cooperation with the Federal officers, listening (R. 267-269). Just as the mails must be kept pure from obscene matters so the telephones must be kept pure from being used for such dirty business as instruments to lure men into arrest. This certainly violated the Federal Communications Act, Title 47, Section 605, as follows:

> ". . . and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; and *no person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire or radio and use the same or any information therein contained for his own benefit of another not entitled thereto;* and no person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, *knowing that such information was so obtained, shall divulge or publish the existence, con-*

tents, substance, purport, effect, or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto;..." (Emphasis added.)

Certainly the use of the telephonic instrument in the way testified to in the testimony of Miss Brander, herself, the Government's own witness, shows that it was all conducted for the benefit of the Government's agent seeking entrapment.

This violates both the Fourth Amendment to the Constitution and the statutory provision relating to Title 47, Section 605. See the following cases:

Nardone v. *U. S.*, 302 U. S. 379 and 308 U. S. 338.
Weiss v. *U. S.* 308 U. S. 321.

See, also *Olmstead* v. *United States*, 277 U. S. 438, wherein Mr. Justice Brandeis, in a dissenting opinion, involving wire tapping before the Federal Communications Act of 1934 was passed, said:

"Experience should teach us to be most on our guard to protect liberty when the government's purposes are beneficient. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest danger to liberty lurk in insidious encroachment by men of zeal, well-meaning, but without understanding . . .

" prove its case, the government was obliged to lay bare the crimes committed by its officers on its behalf. A federal court should not permit such a prosecution to continue. Compare Harkin v. Brundage, 276 U. S. 36, *ante*, 457, 48 Sup. Ct. Rep. 268.

"Will this court, by sustaining the judgment below, sanction such conduct on the part of the Executive? The governing principle has long been settled. It is that a court will not redress a wrong when he who invokes its aid has unclean hands. . . ."

II.

The Acts of Margaret Brander, in co-operation with the federal officers, constitutes entrapment.

The Circuit Court held, erroneously, we believe, that the acts of a private person for revenge do not constitute entrapment.

It is important for this court to determine whether under the facts of this case there was entrapment where, as admitted by the Circuit Court of Appeals, the inducement therefor originated with Margo Brander, a private citizen, where the facts also show that it was aided and abetted, advised and encouraged by federal officers who not only listened in on the telephone when the inducement was being carried on, but that it was the result of the cooperative effort of Margo Brander and the officers. The Trial Court also instructed the jury, erroneously we believe, that:

> The Government is not bound by acts of persons who have never been its agents or, if having once been such agents, have ceased to be the agents of the Government at the time of the entrapment complained of. *Neither does the doctrine of entrapment apply to a private citizen who is not an officer of law.* Therefore, even though you might find from the evidence that the defendant has been induced by someone other than a person acting for the government to commit the crime charged, even if he would not otherwise have committed it, and even if the person inducing him to commit it intended later to betray him to the Government, there is no entrapment as long as the person inducing the defendant to commit the crime charged was not at the time acting as an agent of the Government. (R. 382, 383) (Emphasis ours.)

We respectfully submit that this is bad law that makes an agent of the Government a particeps crimines with a private person arranging this "dirty business"[1] and yet

---

[1] Mr. Justice Frankfurter in his book entitled "Mr. Justice Holmes and the Supreme Court," page 63 said:

> And so when opportunity afforded, as in the awful circumstances of Leo Frank's trial, and in the dangerous practice of wire tapping—"*dirty business,*" he called it—he gave concrete and eloquent point to his "main remedy" for the ills of society, namely that we should grow more civilized.

permits the judgment to stand. Certiorari should be granted to change such a wrongful concept of the law of entrapment.

Sorrels v. *United States,* 287 U. S. 435.
Olmstead v. *United States,* 277 U. S. 438.

Mr. Justice Frankfurter in his book "Mr. Justice Holmes and the Supreme Court", p. 63.

In *Olmstead* v. *United States,* Mr. Justice Brandeis said:

> The maxim of unclean hands comes from courts of equity, but the principle prevails also in courts of law. Its common application is in civil actions between private parties. Where the government is the accusor, the reasons for applying it are even more persuasive. Where the remedies invoked are those of the criminal law, the reasons are compelling . . . Decency, security and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously. Our government is the potent, the omni-present teacher . . . If the government becomes the law breaker, it breeds contempt for law. It invites every man to become a law unto himself. It invites anarchy.

The conduct of government officers cooperating with private persons to entrap and ensnare them offends our sense of decency so frequently expressed in the arguments under due process of law. It is abhorent to a free people to permit officers, whether acting alone or with private persons, to ensnare those who had no thought of committing crime until telephoned to, persuaded and induced by a person having evil motives. That certainly was the case so far as Margo Brander's relations were concerned with Bernard Stein as well as Fred Stein. Furthermore, the evidence in this case shows that Margo Brander, by her own admissions, put the narcotics in paper sacks and secreted them in three different places on the premises. (R 151, 152) It is not contended that any of the defendants had actually handled these packages before. There were no finger prints

shown to be on the cans, the cans according to her own claim were secured from an open garage. At first she said she saw Fred Stein use these same cans. The physical evidence belies this. The prosecutor then had her testify to seeing similar cases (R. 138, 139). The indictment in this case charged the secreting of the cans on September 14, and the only person who secreted the cans on that date was Margaret Brander. In this respect the evidence is consistent with her having herself secured and planted the narcotics.

The evidence in this case clearly shows entrapment as a matter of law, and through the use of the telephone.

Mrs. Brander, according to her own statements, was a woman of low character. She was living with the defendant in his house. If her story is to be believed, she knew or thought he was a user of narcotics, and there is as much reason to believe that "birds of a feather flock together." And that the claimed property was hers rather than his.

It is significant that according to her own testimony, she did not reveal the alleged presence of the opium to the police officers whom she brought along with her to the house at the time she came to get her clothes, but only had the narcotic officers come to the place after she telephoned demanding money. $5,000. (R. 319, 336). She had sent an extortionate wire to Fred Stein on a previous occasion (R. 228) demanding a settlement under threats, on a previous occasion.

According to her testimony, she herself secreted the cans of opium after removing them, according to her story, from an open garage putting them in three separate packges, and putting them in paper bags to conceal their appearance or contents, tying them with string and then planting them in three separate places around the premises of the Dixie Canyon Road residence.

By prearrangement, she had called the narcotic officers and had showed them, according to her story, corroborated by them, where the cans were "secreted by her." (R. 150-

152. Her situation is similar to the case of Mrs. Sykes in *Sykes* v. *United States,* 204 Fed. 909, wherein the court quoted Wharton on Criminal Evidence, 9th Ed., Sec. 422, pointing out that a person like Mrs. Brander could by her mere oath transfer to another the conviction hanging over herself. Here the court said regarding some of the stolen mail sacks which were recovered in the mail robbery, and which she claimed to have seen at a given location, and which she blamed others for the situation as follows:

> **"Witnesses testified that after she made this affidavit they went to the place where she testified Sykes threw the gunny sack and found one there, and this testimony is claimed to be corroborative of her evidence. But it is not so, because it does not identify or connect Sykes with the mail bag, or the gunny sack, or the crime as the perpetrator thereof, and that is the only part of her bag-hiding story that was material to the issue cited. She may have placed the gunny sack there herself, some stranger may have done so, and she may have seen it there on some of her rides. Burnhardt, who she says procured the gunny sack, may have hidden the mail bag and thrown the gunny sack where it was found, and he may have told her that he did so, or she may have seen him do it. The fact that the mail bag and the gunny sack were found where she said Sykes placed them, while it tended to show that this confessed criminal knew where the gunny sack was placed, had no more tendency to prove that Sykes put them there than it had to prove that any member of the jury, or any other innocent man did so."**

See also *Dahly* v. *United States,* 50 F. (2d) 37 and 17 Corp. Jur. Sections 3594-3596; *Sykes* v. *United States,* 204 Fed. 909 (C.C.A. 8); *United States* v. *Murphy* (D. C.), 253 Fed. 404; *Jahnke* v. *State,* 68 Neb. 154, 94 N. W. 158, 104 N. W. 154; *Green* v. *State,* 6 Okla. Cr. 585, 120 Pac. 667; *Standford* v. *State,* 16 Okla. Cr. 107, 180 Pac. 712; see also *Mickle* v. *United States,* 157 Fed. 229 (C.C.A. 8); *State* v. *Moe,* 68 Mont. 552, 219 Pac. 830; *State* v. *Wilson,* 76 Mont. 384, 247 Pac. 158; *Cooper* v. *State,* 130 Miss. 288, 94 So. 161; also, *McGinniss* v. *United States,* 256 Fed. 621.

Under the circumstances, we respectfully submit that the court committed prejudicial error in refusing this instruction.

The wrapped packages had no smell or odor to them; (R. 93) they had not been opened and no one knew their contents. (R. 64, 73, 77). The arrest under these circumstances was purely an entrapment forbidden by law.

III.

The Circuit Court erred in holding that when federal narcotic officers were told that there were narcotics, and where the narcotics were secreted, that it was not their statutory and mandatory duty summarily to seize the packages, and in holding that the uses of these packages thereafter to lure someone to pick them up, did not constitute entrapment as a matter of law.

It became the statutory duty of the narcotic officers, upon being informed of the whereabouts of narcotics, summarily to seize the narcotics and seize the holder thereof (Margo Brander as well), Title 21, Sec. 173, U.S.C. Title 21, Sec. 173, U.S.C. says:

> Any narcotic drug imported or brought into the United States or any territory under its control or jurisdiction, contrary to law, shall (1) if smoking opium or opium prepared for smoking, *be seized and summarily forfeited* to the United States Government without the necessity of instituting forfeiture proceedings of any character.

This section made it absolutely mandatory and not discretionary for the narcotic officers to seize the packages which Margo Brander had informed them contained narcotics and which *she* had secreted. They had no discretionary right to give her "immunity" and then leave the narcotics to be used to lure the defendants into an arrest.

The statute does not permit discretion of narcotic officers

thereafter to use the narcotics to entrap other persons or the defendants.

After Mrs. Brander had pointed to the places where the narcotics were and the officers, by examination or otherwise, believed or had reason to believe they were narcotics, the package should have been summarily seized by them and Mrs. Brander should have been seized for she admittedly secreted them.

The participation by Mrs. Brander to get some of the defendants there so they could be apprehended was clearly an entrapment, so definitely forbidden by the statutes and decisions of the United States.

> *Sorrels* v. *United States*, 287 U. S. 435, 77 L. Ed. 413.
> *Butts* v. *United States*, 273 Fed. 35.
> *Neuman* v. *United States*, 299 Fed. 128.

The moment they were so informed and believed the narcotics then became in the constructive possession of the government, and whatever acts were done to use the said narcotics thereafter became the acts of the government in the furtherance of an entrapment. We believe that the court should grant certiorari to determine whether this "dirty business" shall be countenanced by or on behalf of the government.

IV.

The Circuit Court erred in holding that because a mistress of a man holds nominal title to property in her name as a joint tenant, that she may bring narcotic agents on the premises and that without any search warrant, they may both search and seize narcotics without any knowledge that they are narcotics or without reasonable and probable cause, and also seize appellant and arrest him without a warrant, and in holding that such procedure is not violative of the Fourth and Fifth Amendments to the Constitution of the United States.

When Margo Brander moved into the house which Fred Stein bought and which he placed nominally in her name, along with his, in what in California is called a joint tenancy deed with the right of survivorship, and she was thereafter ousted from the premises following a quarrel with him, this did not give her the right to take a brick, throw it through the window, enter the premises and bring narcotic officers on the premises without any search warrant; thereafter, to both search and seize narcotics without any warrant and also to seize the appellant, Bernard Stein and arrest him without any warrant. Such procedure violated the Fourth and Fifth Amendments, and certiorari should be granted because this procedure and proceeding is in conflict with this Court's holding in the cases of *Di Re* v. *United States,* 92 L. Ed. 218; *Takahashi* v. *United States,* 143 F. 2d 118; *Boyd* v. *United States,* 116 U. S. 616.

What the Circuit Court failed to consider was that the Fourth and Fifth Amendments forbids both *searches* and *seizures.* Even if Margo Brander had the right to enter the premises herself, she had no right to bring officers on the premises to arrest and *seize* the appellants without a warrant of arrest.

V.

5. The Circuit Court erred in upholding the district court ruling in failing to direct the verdict for insufficiency of the evidence.

The evidence was insufficient to justify the verdict. The verdicts are contrary to the law and evidence.

Fred Stein was at no time present. The indictment alleges that on or about September 14th, 1945, the defendants "did knowingly, wilfully, unlawfully, feloniously, and fraudulently receive, conceal and facilitate the transportation and concealment after importation of a certain narcotic drug, to-wit: Approximately 56 ounces of prepared smoking opium. (R. 2). There is absolutely no evidence that Fred Stein ever received or concealed or facilitated the transportation and concealment of 56 ounces of prepared smoking opium. The evidence as to Fred Stein rests entirely upon the testimony of Mrs. Marguerite Brander, that she saw the package in the open garage at the Dixie Canyon Road address some time prior to the night that she herself states that she concealed the same after wrapping up the cans in paper and in putting them in three bags, and herself concealing those bags in three places on the premises.

In no wise is there any evidence to show that Fred Stein ever knew that the cans were on the premises, that he ever handled them, or had them concealed, or placed them anywhere upon the premises as alleged in the indictment. It is unreasonable and inherently improbable that he would leave these cans in an open garage for 11 days if he knew anything about them.

Furthermore, there is no evidence of guilty knowledge which is an essential element of the events to be proved.

People v. *Gory*, 28 Cal. (2d) 450.

AS TO BERNARD STEIN.

The evidence is entirely insufficient as to Bernard Stein. He did not conceal the opium. He did not receive it except as wrapped up in a package by Marguerite Brander in paper which she tied it around with and with string which she herself tied around it, and acting under and in cooperation with the Federal Officers.

There is nothing to show that he knew the contents of the can or that he knew that he was receiving or transporting opium or that he had any means of knowledge of the same. The circumstances would seemingly negative any such knowledge or belief for a man who is about to transport a narcotic. If he knew he was doing that, he would certainly not do so in the presence of several strangers, who happened to be, in this case, federal narcotic officers.

People v. *Gory*, 28 Cal. (2d) 450.

VI.

6. The Circuit Court of Appeals should have directed the verdict because of the use of evidence introduced in the case which had been obtained by unlawful search and seizure in violation of the Fourth and Fifth Amendments to the Constitution of the United States.

It must be clearly borne in mind that the evidence regarding the yen shee first developed in the trial of the case, that the indictment did not charge anything about this yen shee, and the first knowledge of the facts about it came from the testimony at the time it was introduced. (See *McNabb* v. *U. S.*, 318 U. S. 322) * As a matter of fact, the

* On page 370 of the transcript of record, the following proceedings took place:

"Mr. Lavine: May it please the court, at this time we move to strike from the evidence the testimony which was offered yesterday regarding the yen shee, or particularly the exhibit, which I think was Government's Exhibit 4, regarding the yen

prosecutor himself had not introduced it at first, and he later called back Marguerite Brander, with the consent of the Court, to ask further questions about it, [R. 193]. Upon its first introduction there was an objection to its introduction on the ground that it violated he defendant's rights under the Fourth and Fifth Amendments to the Constitution of the United States and that the officers had at the time neither any search warrant or any process [R. 194].

The going into the house by the former sweetheart of Stein, who broke in with two bricks, and thereafter, on the day subsequent to the date of the finding of the cans of smoking opium in their house, with them and making a further search and seizure, was not lawful. Her nominal ownership of the premises as a joint tenant did not give the officers the consent of the defendant to search and seize the evidence.

Amos v. *U. S.*, 255 U. S. 313;
Johnson v. *U. S.* (decided Feb. 2, 1948), 16 L. W. 4133.

---

shee, as incompetent, irrelevant and immaterial under this indictment, as to any matters alleged in the indictment. And we move to strike it from the evidence.

The Court: The motion is denied and an exception noted."

* * * * * * * * * *

"Mr. Lavine: I move, again, your Honor, on all of the grounds heretofore mentioned, first of all, for a directed verdict on the grounds of the insufficiency of the evidence; second, I move for a directed verdict on the grounds that the defendant Fred Stein was entrapped; and, third, I move for a directed verdict on the ground that as to some of the evidence in this case, relating particularly to Government's Exhibit 4, I believe, the yen shee, the house was illegally searched and it was illegally seized.

* * * * * * * * * *

The Court: The motion is denied and an exception noted.

Mr. MacDonald: May it please the court, on behalf of the defendants John Fisher and Bernard Stein, and each of them, *I join in the same motions that were made by Mr. Lavine in reference to the defendant Fred Stein;* * * *"

The mere fact that the deed to the property was placed in joint tenancy did not place the property in the ownership of Marguerite Brander. All of the money for its purchase was put up by the defendant Fred Stein. She was no more under the facts of this case than a trustee of his interest, with a possible right of survivorship in the event of his death. She was no more entitled to the property than other persons who receive property in their name, but are holding it for the benefit and trust of another. At no time did Marguerite Brander claim any right or title to the property itself, or right to possession or to remain there. She was not and could not be the lawful wife of the defendant, nor could she claim any rights thereunder if she had married the defendant. Many a person puts property in the name of another, but holds it for his benefit during the nominal title thus held. Marguerite Brander had no actual rights in the property and could not give consent to the officers to enter the premises for the purpose of searching for and seizing evidence.

Amos v. *U. S.*, 255 U. S. 313;
Johnson v. *U. S.*, 16 L. W. 4133.

If a lawful wife cannot do so, certainly a woman in the position of Marguerite Brander could not do so. A joint tenancy, as a matter of law, even if its fullest effect were to be granted, would only give Marguerite Brander a separate and equal share in the property and such separate and equal share is divisible.

There was also a question raised about whether the arrest itself was lawful. If the arrest was unlawful, any seizure that followed was necessarily unlawful.

Johnson v. *U. S.* (decided Feb. 2, 1948), 16 L. W. 4133.

On page 92 of the record the following occurs:

[3] On page 92 of the record the following occurs:

"Q. Mr. Davis, in your experience as a narcotic officer have you ever had occasion to be near premises or rooms where

opium has previously been smoked or cooked and detect or observe the odor of a place where opium has been so used? A. Yes, sir, I have.

Q. At the time in question on this evening did you observe any peculiar odor or any odors which in your opinion were those from a previous use of opium on the premises?

Mr. Lavine: Just a minute. I object to that as incompetent, irrelevant and immaterial and not proper redirect examination.

Mr. Neukom: There has been an effort made, your Honor, to point out this man had no probable cause for the arrest.

The Court: Let us not argue the question now. I can see the point. The objection is overruled.

Mr. Lavine: Exception.

The Court: Exception noted.

The Witness: I did not smell any smoking opium up there that night." [R. 92-93.]

It is apparent from the foregoing that counsel was well aware from the questions asked by counsel that "there has been an effort made to point out this man had no probable cause for the arrest," (referring to George R. Davis, a Government agent).

The procedure was challenged by motion in arrest of judgment, based upon objections that the defendant's constitutional rights under the Fourth and Fifth Amendments to the Constitution of the United States had been violated. While the motion was not specifically predicated on the unlawfulness of the arrest itself, the introduction of the evidence in the case could only be lawful if it was seized pursuant to a lawful arrest. Here there was not a lawful arrest. What the officers found later on could not be justified under the unlawfulness of the arrest itself and, therefore, both the search and siezure were unlawful.

See page 193 where the court, over objections that it violated the Fourth and Fifth Amendments, admitted the yen shee in evidence.

Direct Examination.

Q. By Mr. Neukom: I show you a little bottle, Government's Exhibit No. 4 for identification, and ask you if you have ever seen that before? A. Yes, sir.

Q. Will you look at it? At the time that you saw it did it contain approximately that much liquid? A. Yes, sir.

Q. And when did you first see this bottle containing the liquid? A. That was found in my cabinet where I keep my spices and flavorings.

Mr. Lavine: I move that the answer be stricken as a conclusion of the witness.

The Court: I didn't understand the answer.

(Answer read by reporter.)

Mr. Neukom: May I lay further foundation?

The Court: Did you find it? A. Yes, sir; I found it with two federal agents that were with me.

Q. By Mr. Neukom: When was that? A. That was the day after—that was the 15th. * * *

Mr. Lavine: So the record is clear, we object to this evidence on the ground it is violative of the Fourth and Fifth Amendments to the Constitution of the United States and on the further ground it was an illegal search and seizure with no process shown for the entry and search of this house.

The Court: Objection overruled.

Mr. Lavine: Exception. * * *

Mr. Lavine: To which we object on the ground that it is incompetent, irrelevant and immaterial and in violation of the defendants' rights under the Fourth and Fifth Amendments of the Constitution.

The Court: Objection overruled and exception noted, and it is admitted in evidence.

(The bottle referred to, heretofore marked as Government's Exhibit No. 4, was received in evidence.)" [R. 193-196.]

Margo Brander might have had authority to permit them to search for her property but not for his and in no event to seize his property.

Amos v. *U. S.*, 255 U. S. 313;

Anne Johnson v. *U. S.*, 16 L. W. 4133.

"Belief, however well founded, that an article sought is in a dwelling house furnishes no justification for a search of that place without a warrant, and such searches are held unlawful notwithstanding facts unquestionably showing probable cause. (Agnello v. United States, 269 U. S. 20, 33.)"

To permit searches as were conducted by the officers in this case is to transfer the Fourth Amendment to a nullity

and leave the defendant's home secure only in the discretion of police officers . . . The right of officers to thrust themselves into a home is also a grave concern, not only to the individual but to a society which chooses to dwell in reasonable security and freedom from surveillance. When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or Government Agent."

In *United States* v. *Di Re,* 16 L. W. 4071, 92 L. Ed. 218, the Supreme Court said: "The Government says it would not contend that armed with a search warrant for a resident only, it could search all persons found in it." The same reasoning would apply—only stronger—to the contention that without a search warrant, the Government could now search a residence and seize articles therein, which were not the property of, and not contended to belong to, the person bringing them into the residence, to-wit, Marguerite Brander.

The things forbidden by the Fourth and Fifth Amendments are two: First, unlawful *search,* and, second, unlawful seizure.

> *Boyd* v. *United States,* 116 U. S. 616, and
> *Takahashi* v. *U. S.,* 143 F. (2d) 118.

Even if he might say that the search was permitted by Marguerite Brander, the seizure thereof, without a warrant or other process, was in violation of the Fourth and Fifth Amendments to the Constitution of the United States:

> "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches *and seizures,* shall not be violated, and no warrants shall issue, but upon probable cause supported by oath or affirmation, and *particularly describing the place to be searched, and the persons or things to be seized."* (4th Amendment, Italics are ours.)

In other words, there was no particular description, and no authority, for the seizure of the yen shee. Nor, for the

seizure of the other packages from the premises, without a warrant.

The Unlawfulness of the Arrest.

The Supreme Court of the United States considers the question of the lawfulness of the arrest in *U. S.* v. *Di Re, supra,* and the manner of arrest of the defendant Bernard Stein was clearly in violation of his constitutional rights.

What the Court further holds is: "That a search without a warrant becomes unlawful when a warrant is obtainable." Hence this case is decisive that the only rights these officers had was to get a warrant.

No probable cause existed from the mere statement of Marguerite Brander, who did not claim to be a user of the substance, and even if it did, it was something to be determined by a *judicial officer,* not the officers. (*Anne Johnson* v. *United States,* 16 L. W. 4133, decided February 2, 1948.)

VII.

The statutory presumption as to guilt from possession of narcotics is inapplicable in a case such as this where the person or persons who are accused were not present when the narcotics were secreted, and where the alleged narcotics were removed from an open barn or garage, and where the narcotics were never shown to have been actually owned or actually possessed by the appellants prior to the seizure, or that the contents of the particular narcotics seized were ever used by the appellants.

The presumption contained in Section 174, Title 21, U. S. C. is in violation of the Fifth Amendment to the Constitution.

(a) The presumption compels self-incrimination in violation of the Fifth Amendment to the Constitution of the United States.

(b) The presumption is vague, indefinite and uncertain and permits the jury to convict "unless the defendant explains the possession to the satisfaction of the jury."

This is an unlawful delegation to the jury of a purely legislative function.

The section reads: "If any person fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or assists in so doing, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported contrary to law, such person shall be fined not more than $5,000 and imprisoned for not more than ten years.

> *"Whenever on a trial for violation of this section the defendant if shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury."* (Italics ours)

(a) The force and effect of the presumption is to compel self-incrimination in violation of the Fifth Amendment to the Constitution of the United States. The Statute makes guilt inevitable unless the defendant explains or denies the testimony against him.

In *Adamson* v. *People of the State of California,* decided June 23, 1947, No. 102, October Term 1946, 15 L. W. 4737, the court said:

> "We shall assume, but without any intention thereby of ruling upon the issue, that state permission by law to the court, counsel and jury to comment upon and consider the failure of defendant 'to explain or to deny by his testimony any evidence or facts in the case against him' would infringe defendant's privilege against self-incrimination under the Fifth Amendment if this were a trial in a court of the United States under a similar law. . . . It is settled law that the clause

of the Fifth Amendment, protecting a person against being compelled to be a witness against himself, is not made effective by the Fourteenth Amendment as a protection against state action on the ground that freedom from testimonial compulsion is a right of national citizenship, or because it is a personal privilege or immunity secured by the Federal Constitution as one of the rights of man that are listed in the Bill of Rights.

"The reasoning that leads to those conclusions starts with the unquestioned premise that the Bill of Rights, when adopted, was for the protection of the individual against the federal government and its provisions were inapplicable to similar actions done by the state. *Barron* v. *Baltimore,* 7 Pet. 243; *Feldman* v. *United States,* 322 U. S. 487, 490."

The Statute, Section 174, Title 21, U. S. Codes, however, given by the court in an instruction to the jury, in effect tells the jury that unless the defendant takes the witness stand and explains the possession, the jury should convict him. This is compulsion to testify in violation of the Fifth Amendment to the Constitution of the United States.

(b) The Section is also unconstitutional in that it leaves the jury to find guilt from mere possession of opium unless the defendant explains "to the satisfaction of the jury."

No standard is set up upon which the jury is to arrive at "satisfaction." No rule is provided; no hint is given to the jury to guide or regulate it. Thus, four jurors may be satisfied for one reason, four for another, and four for still another and without being any unanimity nor based upon any guide or legal standard. Therefore, the law delegates to the jury the power to erect its own standard. Such proceedings are in violation of the Constitution of the United States. See the following cases:

Boyd v. *U. S.,* 30 F. (2d) 900; *Ng Choy Fong* v. *U. S.,* 245 F. 305; *In re Peppers,* 189 Cal. 682; *Louisville etc. Railroad Co.* v. *Commonwealth,* 99 Ky. 132 (59 Am. St. Rep. 457, 33 L. R. A. 209, 35 S. W. 129); *United States* v. *L. Cohen Grocery Co.* 255 U. S.

81, 65 L. Ed. 516, 41 S. Ct. 298, 14 A. L. R. 1045; *Lanzetta* v. *New Jersey*, 306 U. S. 451, 83 L. Ed. 888, 59 S. Ct. 618; *General Construction Co.* v. *Connally* (D. C.), 3 F. (2d) 666; *United States* v. *Reese*, 92 U. S. 214, 23 L. Ed. 563.

In this case also, the court instructed the jury in the language of the statute.

The instruction reads:

> "In a case of this character, despite the fact that the indictment charges that the opium involved had been imported into the United States contrary to law and charges that the defendant knew that fact, still it is not necessary for the Government to offer any evidence in support of the charge that the opium had been unlawfully imported into the United States because, under the law of the United States, if it is shown that a defendant had in his possession the forbidden drug, namely, the opium, such possession alone would authorize conviction unless the defendant or defendants explain their possession to the satisfaction of the jury."

In the case such as the present case where Fred Stein was not present and was not shown ever to have actually possessed the narcotics and the charge was secreting and transporting narcotics on a given date, the statutory presumption was in no wise applicable to him, but for other reasons which we shall hereafter set out, we challenge the statute as unconstitutional and in violation of the due process clause of the Fifth Amendment. Previous decisions have not challenged this section under the challenge that we now present. The Circuit Court did not pass on this challenge although we presented it to them. The statute is now squarely in conflict with the subsequent holdings of this court in *Adamson* v. *People of the State of California*, 332 U. S. 46 and other decisions of this court and certiorari should be granted to resolve these questions.

VIII.

The courts below erred in holding that the rights of each of the appellants were not violated under the Fourth and Fifth Amendments to the Constitution of the United States where a bottle labeled "oil of winter green" and allegedly containing yen shee, a different substance and narcotic than than charged in the indictment (and never shown to be in the actual possession of any defendant), and which was allegedly seized without any search warrant or other legal process a day after the arrest of the appellants, and without their knowledge or consent, and without any showing that they had ever owned or used the product.

We have set forth above the evidence which was presented over the objections of the defendant regarding the bottle of yen shee, Government's Exhibit 4. There was no evidence of any kind that the defendant ever used any yen shee or that he ever knew anything about it or had any possession of it. There was no connection whatsoever shown with Bernard Stein directly or indirectly or otherwise. The officers came in a day after the arrest of the appellants and, according Margo Branden's story, she found the bottle among the spices. Again she might have placed it there herself. The court ruled on the merits and permitted this unlawfully secured evidence to be introduced. It was not alleged in any indictment. The first opportunity to object to it came in the trial as the first knowledge of it came in the trial. Its introduction was highly prejudicial to the appellants and in violation of their constitutional rights. The things forbidden by the Fourth and Fifth Amendments are two: First, unlawful search and, Second, unlawful seizure.

Boyd v. *United States*, 116 U. S. 616
Takahashi v. *United States*, 143 F. 2d 118

Even if he might say that the search was permitted by Margo Brander, the seizure thereof without a warrant or

other process was in violation of the Fourth and Fifth Amendments to the Constitution of the United States.

Di Re v. *U. S.*, 92 L. Ed. 218
Johnson v. *U. S.*, 92 L. Ed. 323

IX.

The District Court erred in arbitrarily refusing to exclude the evidence of the claimed possession of the yen shee and in ruling that it was not unlawfully searched and seized in violation of the Fourth and Fifth Amendments to the Constitution of the United States.

This Court should grant certiorari to decide whether such extraneous evidence vitiates this proceeding under the Fourth and Fifth Amendments.

This is contrary to the holding in previous cases cited and *McNabb* v. *U. S.*, 318 U. S. 332.

X.

The courts below erred in holding that the admission of such evidence did not violate the defendants' rights under the Fourth and Fifth Amendments to the Constitution of the United States.

XI.

The Trial Court erred during the trial of the case in permitting a vast amount of evidence over objections running throughout Margo Brandler's testimony to be introduced regarding the personal relationship of one of the appellants, Fred Stein, and the mistress, Margo Brandler, who brought about his arrest.

Peo. v. *Albertson*, 23 Cal. (2) 550;
Peo. v. *Hill*, 123 Cal. 571;
Peo. v. *Woon Tuck Wo*, 120 Cal. 294.

The record of Margo Brandler's testimony is a complete record of objections to it.

XII.

The Trial Court erred in the instructions it gave to the jury on entrapment ("dirty business"), and particularly the instruction that entrapment ("dirty business") did not exist where a private party did the inducing and entrapping even though in collaboration with government officers.

The court told the jury:

> "The Government is not bound by acts of persons who have never been its agents or, if having once been such agents, have ceased to be the agents of the Government at the time of the entrapment complained of. Neither does the doctrine of entrapment apply to a private citizen who is not an officer of the law. Therefore, even though you might find from the evidence that the defendant has been induced by some one other than a person acting for the Government to commit the crime charged, even if he would not otherwise have committed it, and even if the person inducing him to commit it intended later to betray him to the Government, there is no entrapment as long as the person inducing the defendant to commit the crime charged was not at the time acting as an agent of the Government." (R. 382-383)

This is not a correct statement of the law.

XIII.

The Circuit Court of Appeals erred in holding there was no entrapment when brought about by a mistress in collaboration with federal narcotic officers because it was done, in the opinion of the Circuit Court, by a "private party" as the main or moving force in the entrapment.

We believe this court should negative this holding of the Circuit Court which is contrary to fundamental justice.

Sorrels v. *U. S., supra.*

If the law, applied to the evidence relating to the secreting and retaining in her possession of the cans of opium,

with the consent and approval of the federal agents is not a clear violation of the law, with the legal effect of granting immunity to Mrs. Brander as has been argued, then the same evidence and conduct therein involved establishes an unlawful entrapment of the type which mock justice.

XIV.

The Trial Court erred in its other instructions to the jury with relation to the time of the occurrence of the offenses being immaterial where different dates would make different offenses, and the secreting occurred on September 14 which was the first date established by the Government of the secretion of the narcotics in question.

In this connection we will argue both the points set out and the error of the Court in refusing defendants' requested instruction covering the specific time, and we believe that certiorari should be granted by this Court in its supervisory capacity to decide this important point.

The Court Also Erred in Rejecting the Defendants' Proposed Instruction No. 1A.

"Defendants' Proposed Instruction No. 1A.

> You are instructed that the concealment referred to in this indictment is the secreting of the packages *on or about September 14, 1945*, the date alleged in the indictment. (59)"

The above instruction covered the exact date in the indictment and the court should have given the instruction. Instead, the court gave another instruction which negatived the date specified in the indictment.

The court instructed the jury: "You are instructed that it is not necessary for the Government to prove that any defendant actually concealed the opium or possessed it at the specific date mentioned in the indictment, namely, September 14, 1945. The Government is not required to set

forth the exact date on which the crime was committed and the allegations of a day certain will permit proof of the commission of the crime on any other day within the period of the limitations, that is, within three years prior to the return of the indictment. I further charge you with respect to the date the Government may prove and be entirely within the confines of the indictment, that a person possessed or concealed the opium at a date reasonably close to the date specifically charged."

Thus, the jury might have believed that the defendants did not conceal the opium found on September 14, 1945 but on some other date or time or place which was not specified in the indictment.

We think we were entitled to such an instruction.

The Court Erred in Rejecting the Defendants' Instruction No. 11.

"Defendants' Proposed Instruction 11

> You are instructed that the finding of opium at a given location is not proof that the person who owns or resides at that location is the possessor thereof, but is only proof that it was at the location where it was found. It is incumbent upon the Government to prove beyond a reasonable doubt that the defendant, Fred Stein, knew that it was at that location on the date alleged, to-wit, Sept. 14, 1945, and that he caused it to be on that date concealed at that location, and this proof must be beyond a reasonable doubt, or you must acquit the defendant, Fred Stein. (50)"

The indictment alleged that the offense occurred on or about September 14, 1945. The testimony regarding the concealment at the three places where the opium was concealed was that it occurred on the night of September 14, 1945. This testimony was fixed by Mrs. Brander and by the officers, the discovery being made that same night.

The specific offense, therefore, was the concealment on the night of September 14, 1945, at the three places specified in the indictment.

In *People* v. *Meraviglia*, 73 Cal. App. 402, at 409, it is said:

> "Where the evidence discloses more than one offense the defendant is entitled to demand that the prosecution elect to stand upon some specific offense. The reason for this rule is that the defendant is entitled to a unanimous verdict as to a specific offense. Otherwise some jurors might believe him guilty of one of the offenses proven, and other jurors might be convinced as to some other offenses proven, and it is apparent that all must concur as to his guilt of one and the same offense. And so it follows that the defendant may demand an election as to the specific one relied upon . . . our court has wisely said that in the absence of a specific demand or election it will be presumed that the prosecution relies upon the particular offense as to which he first submits evidence."

The giving of this instruction certainly misled the jury to believe they could convict the defendants regardless of which offense, or any offense, might have occurred. The situation is akin to giving this instruction where an alibi is presented and where a specific date is fixed. Under such circumstances the giving of this instruction has been held to be prejudicially erroneous, requiring a reversal of the judgment.

XV.

The Trial Court erred in refusing to give a series of defense requested instructions:

a. On entrapment. (R. 38)

b. On the finding of narcotics at a location is not proof that the owner of the property is the possessor thereof. (R. 39)

c. On the time of the offense. (R. 38)

d. On entrapment by private individuals working with government agents. (R. 39)

e. On proof of possession being personal to the accused. (R. 38, 39)

f. On the finding of narcotics in an open garage not being sufficient to connect the owner of the property with it. (R. 39)

g. On the requirement that the possession of an accused must be immediate and exclusive. (R. 39)

h. On Margo Brandler being an accomplice as a matter of law (which would mean that her testimony must be viewed with caution and distrust). (R. 39, 40)

The District Court erred in refusing a series of defense requests to charge the jury (R. 36-40), which are set out in the record from pages 36 to 40 and the appendix, because of their length, and also in giving conflicting instructions.

This court should exercise its supervisory power and grant certiorari to correct and clarify the law on the subject.

In one series of instructions the court said that it was no entrapment if the "dirty business" was arranged by a private person (even though the facts show collaboration with government agents). In another instruction, it says the opposite. (R. 382, 383.)

Hence the jury had two conflicting standards, and it is not known which one they followed.

The trial court also refused proper requested instructions regarding narcotics found in an open garage. These are in our appendix to this brief.

XVI.

The evidence taken at the trial of the case affirmatively shows that the conduct of the government officers and their agents amounted to consent on the part of the government acting through said officers and agents to the receiving and transporting by the defendants of smoking opium, which said smoking opium prior to such receiving and transporting by said defendants had been secreted by a person acting as an agent for the said United States Government, and that the said possession of the agent was the possession of the government and required summary forfeiture to the government.

Butts v. *U. S.*, 273 Fed. 35;
Sorrells v. *U. S.*, 287 U. S. 435;
Sykes v. *U. S.*, 204 Fed. 909;
Title 26, Sec. 173.

XVII.

That the government is estopped from this prosecution by reason of the entrapment ("dirty business"), and the lower court erred in not quashing the indictment and ordering the case dismissed.

Sorrells v. *U. S.*, 287 U. S. 435;

The Court below erred in refusing the following instructions and we think that certiorari should be granted by this Court to establish the important matters of law raised by these instructions.

This court should grant certiorari to condemn the misuse of the telephone, which is prohibited by statute of Congress, to nullify the prosecution for the use of the dirty business of entrapment, to disapprove of the illegal use of evidence secured and introduced in violation of the Fourth and Fifth Amendments; to disapprove of the method of arrest and seizure of the person in this case and to disapprove the instructions given and approve the giving

of correctly offered instructions and to hold that the verdicts should have been directed for insufficiency of the evidence and misuse of illegally secured evidence, and to review and revise and clarify or nullify the scope of the statutory presumption of guilt contained in Title 21, Section 174, U. S. Codes.

Wherefore defendants pray that this Honorable Court grant certiorari and that the judgments of each of them be reversed.

Respectfully submitted,

MORRIS LAVINE.

APPENDIX.

THE COURT ALSO ERRED IN REJECTING THE DEFENDANTS' INSTRUCTION NO. 12.

> It is essential for the Government to prove its charge exactly as laid in the indictment, and if you find from the evidence that the articles in question were not secreted by any of the accused at the time and place of finding them, but were secreted by Margo Brander, working in cooperation with Federal Narcotic Officers, then you must acquit the accused. (51)

This was a correct statement of the law and we think the court erred in refusing it. *Sorrells* v. *United States,* 287 U. S. 435, 77 L. Ed. 417, 418.

THE COURT ALSO ERRED IN REJECTING THE DEFENDANTS' INSTRUCTION NO. 13.

"Defendants' Proposed Instruction No. 13

> You are instructed that in order that the defense of entrapment may be available, it is not necessary for the defendants to show that the arrest was arranged to benefit officers of the Government, but if a private person for some motive of her own arranges the arrest of an accused to effect some private purpose, such arrest so arranged comes within the doctrine of entrapment when Federal officers act in cooperation with such persons to effectuate such purpose, and if you find from the evidence in this case that Mrs. Margaret Brander arranged to bring about the arrest of any of the accused to effectuate a private purpose of her own and that Federal officers were working in cooperation with her, you must acquit the accused. (52)"

We think that the same principles govern this instruction as are set forth in *Sorrells* v. *United States,* 287 U. S. 453, 77 L. Ed. 417, 418.

THE COURT ALSO ERRED IN REJECTING THE DEFENDANTS' INSTRUCTION NO. 15.

> You are instructed that to justify the inference of guilt, it is incumbent upon the government not only to prove the fact of possession, but it must also appear that the possession was personal, and that it involved distinct and conscious assertion of possession by the accused.
>
> *People* v. *Hurley*, 60 Cal. 74. (53)

In *People* v. *Hurley, supra,* the court said, in a case involving possession of stolen property, that mere possession is not all that is required to warrant the inference that the defendant stole the property. "But that is not all that is required to warrant the inference that the defendant stole the property. To justify that inference it must further appear that the possession was personal, and that it involved a distinct and conscious assertion of possession by him. And even then such possession may be explained."

We think the same principles of law are applicable here.

In *People* v. *Hurley,* the court said: "The barn was never locked, and the neighbors went into it whenever they chose," etc. Similarly, here the garage was never locked.

The court later also said:

> "We do not think that the bare fact of finding the hides of cattle that had been stolen in the defendant's barn, which is shown to have been open to any one who chose to enter it, in the absence of any evidence tending to prove that he knew or had any reason to suppose that such hides were there, sufficient to justify the inference which the jury must have drawn from it, in order to find the defendant guilty. And we also think that until his declaration that he knew nothing about the hides being there was shown to be false, he was not called upon to give any explanation as to how they came there. If he did not know that they were there he could not explain how they came to be there."

We think as to all of these defendants this instruction is applicable and particularly as to Fred Stein it states the correct law of the case.

THE COURT ALSO ERRED IN REJECTING THE DEFENDANTS' INSTRUCTION NO. 16.

> You are instructed that a finding of narcotics in a person's garage, which was shown to have been open to anyone who chose to enter it, in the absence of any evidence tending directly to prove that he knew of the specific narcotics and had personally secreted or transported them, is not sufficient to justify an inference of guilt.
>
> *People* v. *Hurley,* 60 Cal. 74. (54)

For the reasons given above on Instruction No. 15, we think that the court should have given this instruction also.

THE COURT ALSO ERRED IN REJECTING THE DEFENDANTS' INSTRUCTION NO. 19.

> You are instructed that the burden of proving possession of the narcotics as alleged in the indictment rested upon the prosecution and such possession must have been an immediate and exclusive possession and one under the dominion and control of the defendant, and if you find in this case that the government has failed to prove such possession on the part of any accused of the specific cans and that the possession was exclusive and one under the dominion and control of the defendant Fred Stein on or about the date alleged in the indictment, then it will be your duty to acquit the defendant Fred Stein.
>
> People v. Herbert, 59 Cal. App. 158, 210 Pac. 276, 277 (55)."

In *People* v. *Herbert,* the court set out an instruction in a narcotic case about as we have given it. We think we are entitled to the instruction being given and that it was prejudicial error to refuse to give it.

In *People* v. *Herbert,* the court said:

> "The court instructed the jury in effect that the burden of proving possession of the narcotics as alleged in the information rested upon the prosecution, and such possession must have been an immediate and exclusive possession and one under the dominion and control of defendant. The instructions given by the court fully and correctly stated the law upon the subject."

THE COURT ALSO ERRED IN REJECTING THE DEFENDANTS' PROPOSED INSTRUCTION NO. 22.

"Defendants' Proposed Instruction No. 22.

> You are instructed that the witness Margo Brander is by her own testimony an accomplice of Fred Stein, the defendant in this action. (58)"

We think we are entitled to have the court instruct the jury that Marguerite Brander was an accomplice as a matter of law. *Peo.* v. *King,* 30 Cal. App. (2) 185. She so testified. The instruction on accomplices which the court gave might have been misunderstood to have been the testimony of Fred Stein and might have left the jury in the dark as to whether Marguerite Brander was an accomplice as a matter of law.

Where there is not dispute that the witness is an accomplice, the defendants were entitled upon their request to have the jury so instructed. *People* v. *King,* 30 Cal. App. (2) 185.

THE COURT ALSO ERRED IN REJECTING THE DEFENDANTS' INSTRUCTION NO. 21.

"Defendants' Proposed Instruction No. 21.

> An accomplice is one who aids, abets or participates in the commission of a crime and is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given."

INDEX

CITATIONS

Cases:

Statutes:

In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 772

FRED STEIN AND BERNARD STEIN, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 401-410) is reported at 166 F. 2d 851.

JURISDICTION

The judgment of the circuit court of appeals was entered February 27, 1948 (R. 411), and a petition for rehearing was denied March 30, 1948 (R. 412). The petition for a writ of certiorari was filed April 29, 1948. The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as

amended by the Act of February 13, 1925. See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether the evidence was sufficient to justify the verdict.

2. Whether petitioners were entrapped by Margaret Brander with the cooperation of federal agents.

3. Whether any evidence was admitted at the trial which had been obtained through intercepted telephone conversations in violation of the Communications Act of 1934.

4. Whether the arrest of petitioner Bernard Stein and the consequent seizure of the eight cans of opium was illegal.

5. Whether the bottle containing yen shee was illegally seized.

6. Whether the presumption of guilt arising from possession of narcotics (21 U. S. C. 174) is constitutional and was applicable under the facts of this case.

7. Whether evidence of similar offenses was properly admitted.

8. Whether the trial court erred in its instructions to the jury.

STATUTES INVOLVED

Section 2 of the Jones-Miller Act of February 9, 1909, c. 100, 35 Stat. 614, as amended, provides in pertinent part:

> Any narcotic drug imported or brought into the United States or any territory under its control or jurisdiction, contrary to law, shall (1) if smoking opium or opium prepared for smoking, be seized and summarily forfeited to the United States Government without the necessity of instituting forfeiture proceedings of any character; * * *. (21 U. S. C. 173.)
>
> If any person fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or assists in so doing or receives, conceals, buys, sells or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported contrary to law, such person shall, upon conviction, be fined not more than $5000 and imprisoned for not more than ten years. Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury. (21 U. S. C. 174.)

Section 605 of the Communications Act of June 19, 1934, c. 652, 48 Stat. 1064, 1103, 47 U. S. C. 605, provides in pertinent part:

> * * * no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; and no person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire or radio and use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto; and no person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto: * * *.

STATEMENT

On October 17, 1945, an indictment was returned in the District Court for the Southern District of California charging the two petitioners and John Fisher with violations of the Jones-Miller Act (21 U. S. C. 174) in that they had received, concealed, and facilitated the transportation and concealment of 56 ounces of prepared smoking opium which they

knew to have been illegally imported (R. 2-3). After a jury trial, all three defendants were found guilty as charged (R. 11). Petitioner Fred Stein was sentenced to seven years' imprisonment and fined $500 (R. 25-26). Petitioner Bernard Stein was sentenced to three years' imprisonment and fined $500 (R. 27-28).[1] The judgments were affirmed by the circuit court of appeals (R. 411).

The evidence for the Government may be summarized as follows:

Petitioner Fred Stein and Mrs. Margaret Brander began to live together some time in 1944 and he introduced her to his relatives as his wife (R. 115, 159). In January 1945, after trying in vain to find an apartment, he bought a house on Dixie Canyon Road in Los Angeles; title was taken in the names of Mr. and Mrs. Fred Stein as joint tenants, and they began to live there as Mr. and Mrs. Fred Stein (R. 97-99, 115-116, 224-225).

One day in the summer of 1945, Mrs. Brander walked into the kitchen and saw Fred take some of a black substance from a can, add water, boil it, pour the solution into a bottle and put it in the ice box (R. 116-117, 121). She recognized the can as containing smoking opium because he had previously described such cans to her and told her what they contained (R. 129-132). When she asked what

[1] The files of the Department of Justice show that Fisher was fined $5000 and sentenced to imprisonment for one year and one day, but execution of the sentence was suspended and he was placed on probation for five years. Fisher did not appeal.

he was doing, he explained that it was opium, and that he had been "on it" for some time and could not quit (R. 122, 132). After an argument, he promised to quit (R. 122-123); however, he continued to prepare the solution, consuming a teaspoonful twice a day (R. 123, 126-128, 135).

On or about September 8, 1945, Mrs. Brander accidentally discovered in the garage at the Dixie Canyon home eight similar cans in a box covered with leaves (R. 136-141). On or about September 11, 1945, she and Fred quarreled over his continuing use of opium and she told him she was through with him and left the house (R. 142-146). Some time later the same day she returned with an elderly friend, Mr. Keys, and found that Fred had taken away almost all her clothing, leaving a note telling her where to call him (R. 150, 153-154, 155). She took the eight cans from the garage and concealed them in three separate locations about the premises (R. 151-153). She then called Fred and asked for her clothes; he told her she would not get them until she returned his "stuff" [2] (R. 153, 155-156). After that she moved what personal property she could find to the home of Mr. Keys (R. 189). She called Fred again the next day and he told her that he was leaving town, that his brother, petitioner Bernard Stein, had her clothes, and that she could arrange a meeting with Bernard and give him the "stuff"

---

[2] There was expert evidence that this term, among others, is used in the traffic to designate smoking opium and other narcotics (R. 355, 357-358; see also R. 142).

(R. 158-159). On September 13, and 14, 1945, there were a number of telephone conversations between Mrs. Brander and Bernard and Fisher, who was a friend of the Steins, as the result of which it was finally arranged, in the early evening of September 14, that as soon as she could get Mr. Keys' car she would meet Bernard and Fisher at the Dixie Canyon house and receive her clothes and show them where the "stuff" was (R. 160-168, 180-184, 186).

At this point Mrs. Brander telephoned Agent Koehn of the Federal Bureau of Narcotics, with whom she had no previous acquaintance (R. 168-169, 201-202, 265).[3] Koehn, accompanied by his wife, drove to Keys' house and met Mrs. Brander there between 7:30 and 8:00 p. m. (R. 202, 267, 280, 281). On her own initiative, she then called Fisher to tell him that she would drive over to meet him and Bernard Stein at the Dixie Canyon house. Koehn listened in on this conversation but made no suggestions as to what she should say. (R. 169-170, 202, 205-206, 267-268, 281-282.) After Koehn had telephoned another agent, Davis, to meet them (R.

---

[3] There are indications in the record that petitioners had been under investigation by agents of the Bureau of Narcotics for over a year prior to September 1945 (R. 47-49, 266-267). When Mrs. Brander and Fred Stein began to keep company in 1944 she was living in the home of Mr. Keys, and Koehn had visited Keys in connection with the investigation. Mrs. Brander knew of this, although she had never met Koehn. On the night of September 14, 1945, she obtained the agent's phone number from Keys. (R. 196-202.) Keys, it may be noted, was a retired police officer (R. 268), but there is nothing in the record to substantiate the statement (Pet. 22) that he had been a federal officer.

268-269), Koehn, his wife, and Mrs. Brander started for Dixie Canyon Road in Koehn's car. On the way they stopped and Mrs. Brander made another call to Fisher to ascertain whether he had left. Koehn again listened in but made no suggestions. Fisher told Mrs. Brander that he would start as soon as Bernard Stein was ready, and that she would get her clothes if she told them where the "stuff" was. (R. 171, 187-188, 206-207, 269, 282.) Koehn then picked up Davis, whom Mrs. Brander had never seen or talked to before, and drove to the Dixie Canyon house. There they parked the car on the driveway and, without entering the house, went around to the rear yard, where Mrs. Brander hurriedly pointed out to them the three locations where she had hidden the opium. The agents did not actually see the packages. Agent Davis concealed himself in the rear yard where he could see the three hiding places. Agent Koehn, his wife, and Mrs. Brander returned to the front and waited in the car. (R. 49-50, 63-68, 77-80, 85, 171-172, 207-208, 249-250, 269-271, 284.)

About an hour later, Bernard Stein drove up with Fisher. Mrs. Brander introduced the Koehns as "Mr. and Mrs. Anderson, friends of mine." She then took Bernard to the hiding places in the rear and he picked up the three packages and carried them around the side of the house toward the front. Before he had come out of the shadow, however, he dropped the cans and said that he would not take them out in front of strange people. After some

discussion, Fisher said that he would carry them out himself if Bernard was afraid to do it. Fisher then picked up two of the packages and Bernard picked up the other, and they started to walk toward their car with the packages in their hands. At this point they were arrested by Agent Koehn, who had remained seated in his car, and by Agent Davis, who had in the meantime come around to the front of the house. (R. 50-54, 71-73, 80-88, 173-178, 208-218, 271-276, 283-284.) The cans contained approximately 56 ounces of smoking opium (R. 106).

On September 15, 1945, the day following the arrests, Mrs. Brander returned to the house with two federal agents. She entered,[4] taking the agents in with her. She made a search about the kitchen and found, in her spice and flavoring cabinet over the stove, a small bottle containing yen shee (the residue from the smoking of opium) in a solution of water. This she turned over to the federal officers. (R. 59-60, 102-103, 193-196.)

ARGUMENT

Petitioners' brief in support of their petition ignores all the more damaging portions of the Government's evidence, particularly Mrs. Brander's testimony that they had demanded that she return the eight cans of opium long before she had any contact with the agents of the Bureau of Narcotics.

---

[4] The manner of her entry on this particular occasion does not appear. When she returned for her clothes the day of her quarrel with petitioner Fred Stein she broke a window in order to get in (R. 154, 189, 236-237).

Hence, mere reference to the foregoing summary of the evidence will dispose in large part of petitioners' contentions.

1. Thus, contrary to petitioners' contention that the evidence was insufficient to justify the verdict (Pet. 5, 18, 31-32), there was ample proof from which the jury could have concluded that petitioner Bernard Stein on the night of September 14, 1945, knowingly received 56 ounces of smoking opium, and that in so doing he acted as the agent of his brother, petitioner Fred Stein.

2. Petitioners contend that they were entrapped by Mrs. Brander acting in cooperation with the agents (Pet. 4, 8, 17, 24-28). But the defense of entrapment is sustained only where it is shown that the criminal design is instigated by the officers; artifice and stratagem may be employed to catch those engaged in criminal enterprises. *Sorrells* v. *United States,* 287 U. S. 435. The evidence clearly shows that the criminal design—the purpose to retrieve the opium from Mrs. Brander—originated with petitioners. There is not the slightest evidence that the criminal intent originated with Mrs. Brander, much less with the agents. The intent to conceal the opium was clearly present in the mind of petitioner Fred Stein long before the events of September 11, 1945, when she secreted it, and he demanded that she return it as soon as he was aware that it was missing (R. 155); and it was at the instigation of Fred that petitioner Bernard Stein

became a party to the transaction (R. 159-162). The federal agents did not enter the picture until Mrs. Brander and Bernard had already agreed to meet for the purpose of exchanging her clothes for the opium (R. 168). The record does not show that even then the agents made any suggestions as to what she should do. They merely accompanied her and observed.[5]

3. Petitioners appear to contend that the two telephone calls from Mrs. Brander to Fisher [6] which were overheard by Agent Koehn in some manner violated Section 605 of the Communications Act of 1934 (Pet. 4, 17, 21-23). We can perceive no basis for the contention. There is clearly nothing in the cited section which would prohibit the use of the telephone by a decoy, or by a federal agent, in furtherance of an artifice or stratagem where the criminal intent has had its origin in the mind of the criminal. It is true that Section 605 prohibits the use by an unauthorized person of information contained in an intercepted communication. But even if Agent Koehn was an unauthorized person, he did not testify as to what was said in these two conversations (R. 268-269, 368-369)—the fact that

---

[5] Petitioners argue that the agents should have seized the opium as soon as Mrs. Brander pointed it out to them, because it then came into constructive possession of the Government, and that the failure to do so constituted entrapment (Pet. 4-5, 18, 28, 29). But, as we have seen, there was evidence that the criminal design had originated with petitioners, and it was perfectly proper for the agents not to intervene before the criminal act reached fruition. *Sorrells* v. *United States*, 287 U. S. at 441-442.

[6] The petition incorrectly states that one of these was made to Bernard Stein.

he had listened in was first brought out by Bernard Stein's attorney during cross-examination of Mrs. Brander after she had testified on direct as to what was said (R. 205-207). Nor is there anything in the record to indicate that Koehn made such derivative use of what he heard as to render any substantial portion of the Government's case a "fruit of the poisonous tree." See *Nardone* v. *United States,* 308 U. S. 338, 341. At the time of the conversations he already knew of the proposed meeting and, so far as appears from the record, he made no suggestions as to what Mrs. Brander should do.

4. Petitioners argue that the arrest of Bernard Stein and Fisher without a warrant and the consequent seizure of the cans of opium was illegal (Pet. 5, 18, 30, 34-35, 38). But the agents needed no warrant on the night of September 14, 1945, for they were on the premises at the invitation of Mrs. Brander, a joint tenant, and they engaged in no search, but merely observed the locations which she pointed out as the hiding places of the opium (R. 50, 68-69, 270). They certainly had reasonable cause [7] to believe that Bernard Stein and Fisher

[7] Under California law, § 836, Cal. Penal Code, which determines the validity of the arrests, *United States* v. *Di Re,* 332 U. S. 581, 589-591, a peace officer may arrest without a warrant:

"1. For a public offense committed or attempted in his presence.

"2. When a person arrested has committed a felony, although not in his presence.

"3. When a felony has in fact been committed, and he has reasonable cause for believing the person arrested to have committed it.

"4. On a charge made, upon a reasonable cause, of the commission of a felony by the party arrested.

"5. At night, when there is reasonable cause to believe that he has committed a felony."

were committing a felony at the time of the arrest, and it was unnecessary to search them since they were openly carrying the packages. This case is readily distinguishable from *United States* v. *Di Re,* 332 U. S. 581, in which Di Re was arrested and searched without reasonable cause to believe that he had committed a felony, and from *Johnson* v. *United States,* 333 U. S. 10, where it was held that officers entered the premises without consent and searched without a warrant, though there was opportunity to obtain one. It may also be noted that petitioners, while objecting to the introduction of this evidence, never made a proper motion to have it suppressed.

5. Petitioners also contend that the bottle containing the yen shee was obtained by means of an illegal search and seizure (Pet. 5-6, 19, 30, 32-34, 35-38, 42-43). On the day after the arrest Mrs. Brander, the joint tenant, took two agents into the house; she made a search, which she certainly had a right to do, and discovered in her kitchen spice cabinet the bottle of yen shee, which she turned over to the agents (R. 193-196). Here again the agents needed no warrant. They were on the premises by consent, and so far as the record shows they did not join in the search. The yen shee was contraband, subject to summary forfeiture. Consequently, it was not the property of petitioner Fred Stein, but of the United States. *United States* v. *Stowell,* 133 U. S. 1, 16-17; *Henderson's Distilled Spirits,* 14 Wall. 44, 57; *Caldwell* v. *United States,*

8 How. 366, 379-382. Mrs. Brander had the right to search through her own house and to turn over the contraband, and the agents had the right to receive it. Here again we note that there was no motion to suppress the evidence.

6. Petitioners contend that the presumption of 21 U. S. C. 174, which permits the jury to convict upon evidence of possession of narcotics unless satisfactorily explained, is not applicable under the facts of this case and is, moreover, unconstitutional in that it compels self-incrimination and sets up no proper standard for guidance of the jury (Pet. 5, 6, 18, 19, 38-41). We think it obvious that the presumption is applicable to both petitioners since Bernard Stein was acting as agent for his brother, Fred. In *Yee Hem* v. *United States,* 268 U. S. 178, this Court held that the presumption did not result in compulsory self-incrimination, and there is nothing to the contrary in *Adamson* v. *California,* 332 U. S. 46, which involved a peculiar California statute requiring a repeated offender to choose between taking the stand and having his prior offenses revealed or remaining silent and having his silence commented on to the jury. This Court also indicated in the *Yee Hem* case that the standard provided by the statute is sufficient. 268 U. S. at 184; see also *Gonzales* v. *United States,* 162 F. 2d 870 (C. C. A. 9).

7. Petitioners contend that the evidence as to the yen shee and as to the preparation and consump-

tion of opium by Fred Stein was erroneously admitted because it related to offenses not charged in the indictment (Pet. 6, 19, 42, 43). But this evidence was clearly admissible under the well recognized exception which permits evidence of similar offenses to be introduced to prove intent or guilty knowledge and to rebut a claim of mistake.

8. We submit that the court's instructions to the jury (R. 374-389), when read as a whole, were fair, comprehensive and adequate. In the light of these instructions and of the evidence before the jury, we think it clear that the instructions proposed by petitioners and refused by the court were either erroneous, or misleading, or already satisfactorily covered. We see no necessity for treating in detail the numerous contentions (Pet. 6-7, 20-21, 44-48, 51-54) urged by petitioners in this respect.

CONCLUSION

The decision of the circuit court of appeals is correct, and no conflict of decisions is involved. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

PHILIP B. PERLMAN,
Solicitor General.
T. VINCENT QUINN,
Assistant Attorney General.
ROBERT S. ERDAHL,
JOSEPH M. HOWARD,
Attorneys.

June 1948.

☆ U. S. GOVERNMENT PRINTING OFFICE, 1948 709859